Tufo Wholesale Dairy, Inc. *and* Local 27, Paper Products Drivers, Warehousemen and Messengers, International Brotherhood of Teamsters, AFL–CIO. Cases 2–CA–26601, 2–CA–26881, and 2–RC–21302

February 29, 1996

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 22, 1995, Administrative Law Judge Joel P. Biblowitz issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified.[2]

We agree with the judge that the Respondent engaged in extensive violations of Section 8(a)(1) of the Act during and after the Union's election campaign at the Respondent's facility. We also agree with the judge that the Respondent's unfair labor practices have ''a tendency to undermine the union's majority strength and impede the election process,'' that the holding of a fair second election is unlikely, and that consequently a bargaining order is appropriate.[3]

In opposing the bargaining order, the Respondent points to the following. The record shows that there were 11 employees in the unit at the time of the election, 7 of whom continue to be employed by the Respondent; and of the 4 unit employees who were the objects of the majority of unfair labor practices, only 1 is currently employed by the Respondent. The Respondent urges that the Board not grant a bargaining order based on this evidence of turnover in its work force since the time of the election.

The Board has consistently held that because ''the validity of a bargaining order depends on an evaluation of the situation as of the time the unfair labor practices were committed,'' evidence regarding employee turnover is irrelevant to an assessment of the propriety of a *Gissel* bargaining order.[4] However, this proceeding arises in the Second Circuit, which we recognize has repeatedly held employee turnover to be relevant to this issue.[5] We shall, therefore, consider the Respondent's contention.

The unfair labor practices were serious,[6] and, contrary to the Respondent's assertion, the conduct directly affected the entire unit. The Respondent emphasizes that the majority of the unfair labor practices were directed at four individuals. The remaining violations, however, were deliberately addressed to the entire unit. First, the Respondent violated Section 8(a)(1) by purposely scheduling a meeting to prevent employees from attending a union meeting. Second, the Respondent violated Section 8(a)(1) by promising those who attended the meeting a benefit if the Union lost the election. In short, the Respondent's unlawful conduct was widespread, touching directly on 10 of the 11 employees.[7]

Further, we find relevant that the Respondent continued its unlawful activities after the election.[8] When reminded that he had not followed through on a promise made before the election, the Respondent's owner, John Rapillo, blamed the pending union objections. Perhaps even more significant in light of the seriousness of the violation, Rapillo continued to engage in illegal activity up to the hearing date when on two occasions he interfered with the Board's processes by discouraging an employee from complying with a subpoena to appear at the hearing. Such postelection misconduct, particularly the interference with Board processes, reveals continued hostility to employee rights and substantial likelihood of the Respondent again engaging in illegal activities.[9]

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[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Given our findings regarding the seriousness and widespread nature of the unfair labor practices and the likelihood of recurrence, we shall modify the judge's recommended Order to provide broad cease-and-desist language. See *Hickmott Foods*, 242 NLRB 1357 (1979).

[3] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[4] *Highland Plastics*, 256 NLRB 146, 147 (1981).

[5] E.g., *NLRB v. J. Coty Messenger Service*, 763 F.2d 92 (2d Cir. 1985).

[6] Many of the Respondent's unfair labor practices were the type that have come to be known as ''hallmark violations'' because they are highly coercive and have a lasting effect on election conditions. *Highland Plastics*, supra, 256 NLRB at 147.

[7] Of the seven employees who the Respondent asserts were not subjected to the ''preponderance'' of the misconduct, six attended the employee meeting.

We also observe that 7 out of the 11 individuals remain employed by the Respondent. This, in terms of the entire unit, is not a large turnover rate. Given the small size of the unit and the substantial number of employees that remain employed, it is foreseeable that the Respondent's record of coercion would become known to new employees and that the impact of the Respondent's violations would be likely to persist despite any turnover. See *Bandag v. NLRB*, 583 F.2d 765, 772 (5th Cir. 1978) (''Practices may live on in the lore of the shop and continue to repress employee sentiment long after most, or even all, original participants have departed.'').

[8] *Salvation Army Residence*, 293 NLRB 944, 945 (1989), enfd. mem. 923 F.2d 846 (2d Cir. 1990).

[9] *Eddyleon Chocolate Co.*, 301 NLRB 887, 891 (1991).

In sum, the following factors convince us of ''the likelihood of recidivist behavior'':[10] The unfair labor practices were serious and widespread. John and Steve Rapillo, who engaged in the unlawful conduct, remain the Respondent's owners.[11] The Respondent's misconduct persisted after the election and up to the time of the hearing. To withhold a bargaining order in these circumstances would, in effect, reward the Respondent for its own wrongdoing.[12]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Tufo Wholesale Dairy, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(k).

''(k) In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.''

2. Substitute the attached notice for that of the judge.

IT IS FURTHER ORDERED that the election conducted in Case 2–RC–21302 is set aside and the petition in that case is dismissed.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT schedule meetings with employees in order to prevent them from attending previously scheduled meetings of Local 27, Paper Products Drivers, Warehousemen and Messengers, International Brotherhood of Teamsters, AFL–CIO or any other labor organization.

WE WILL NOT promise our employees improved benefits and working conditions if the Union loses the election.

WE WILL NOT create an impression among our employees that we are keeping their union activities under surveillance.

WE WILL NOT tell our employees that it would be futile for them to attempt to select the Union as their bargaining representative.

WE WILL NOT threaten to close our facility or threaten that the employees will be out of work if the Union wins the election.

WE WILL NOT interrogate our employees about their union activities or support.

WE WILL NOT threaten our employees that, if the Union wins the election, the Union would try to prevent all drivers without commercial drivers' licenses from working.

WE WILL NOT blame the Union and the objections that it filed for not giving our drivers a 40-hour workweek.

WE WILL NOT tell our employees that they do not have to comply with a Board subpoena or otherwise interfere with the Board's processes.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain with the Union for our employees in the following appropriate unit:

All full-time and regular part-time warehousemen, drivers and office clerical workers, but excluding all other employees, supervisors, professional employees and guards as defined in the Act.

TUFO WHOLESALE DAIRY, INC.

Suzanne Sullivan, Esq., for the General Counsel.
Jedd Mendelson, Esq. and *Kevin Casey, Esq. (Grotta, Glassman & Hoffman),* for the Respondent.
Alfred Muscio, Esq., for the Charging Party Petitioner.

[10] *Salvation Army,* supra, 293 NLRB at 945.

[11] See *F & R Meat Co*., 296 NLRB 759 (1989), where the Board stated that ''[t]he continued presence of the perpetrators of the unlawful acts could still exert a coercive effect over the unit employees.'' This is particularly true here where the violations were committed by the Respondent's owners. Employees would readily perceive the Rapillos as representing company policy and as possessing the ability to implement unlawful threats.

[12] In opposing the bargaining order, the Respondent does not rely on the passage of time since the unfair labor practices. The election was in May 1993 and the judge's decision issued in June 1995. This passage of time is not due to delay, but rather is an ''ordinary institutional time lapse[ ] inherent in the legal process.'' *America's Best Quality Coatings Corp. v. NLRB*, 44 F.3d 516, 522 (7th Cir. 1995).

Member Cohen does not pass on the issue of whether employee turnover should be a relevant factor in deciding the propriety of a *Gissel* bargaining order. Assuming arguendo that it is, the turnover here is insufficient to warrant the denial of the bargaining order.

DECISION

STATEMENT OF THE CASE

JOEL P. BIBLOWITZ, Administrative Law Judge. This case was heard by me on August 24 and November 3, 1994, and March 28, 29, and 30, 1995, in New York, New York. The consolidated complaint issued on November 15, 1993,[1] and was based on charges filed on June 8 and October 4 by Local 27, Paper Products Drivers, Warehousemen and Messengers, International Brotherhood of Teamsters, AFL–CIO (the Union). The complaint alleges that the following employees of Tufo Wholesale Dairy, Inc. (Respondent) constitute an appropriate unit within the meaning of Section 9(b) of the Act: All full-time and regular part time warehousemen, drivers and office clerical workers employed by the Respondent at its facility at 4180 Boston Post Road, Bronx, New York, herein called the facility, but excluding all other employees, supervisors, professional employees and guards as defined in the Act, and that since about April 9, a majority of these employees selected the Union as their bargaining representative. It is also alleged that on about April 27, the Union, through its business agent, Richard Ruggiero, demanded that Respondent recognize the Union as the bargaining representative of these employees and, on about that date, Respondent, by its attorney, refused to so recognize the Union. The complaint then recites a number of 8(a)(1) allegations of actions by John Rapillo (Rapillo) and Steve Rapillo, Respondent's owners and officers in April, May, and June. It is alleged that they promised employees a 40-hour workweek and other unspecified benefits if they voted against the Union in the upcoming election, threatened to discharge all the drivers if the Union won the election, informed employees that it would be futile to select the Union as their bargaining representative, interrogated employees about their union activities and the union activities of their fellow employees, created an impression among their employees that their union activities were under surveillance by Respondent, impliedly promised to pay an employee's delinquent parking tickets if the Union lost the election, and interfered with the Board's processes by discouraging employees from obeying the Board's subpoenas. It is further alleged that the extent of these unfair labor practices warrants a bargaining order based on the Union's majority status.

On November 18, the Region issued an order further consolidating cases and notice of hearing on objections. This order recites that after the election here was conducted, the Union filed timely objections as well as the unfair labor practice charges referred to above, and that evidence was adduced as to whether the Respondent engaged in the following activity: promising the employees a reduced workweek if the Union was rejected, informing its employees that it was futile to select the Union as their bargaining representative, offering to meet the financial obligations of an employee if the Union was defeated, threatening employees with more stringent working conditions if the Union won the election, interrogating employees about their, and fellow employees', union support, threatening to discharge employees if the Union won the election, detaining employees at work for the purpose of interfering with a previously scheduled union meeting, and conveying the impression to its employees that their union activities were under surveillance by the Respondent. The Regional Director ordered that a consolidated hearing be held to receive testimony with respect to the Union's objections as well as the unfair labor practices alleged.

[1] Unless indicated otherwise, all dates referred to here relate to the year 1993.

FINDINGS OF FACT

I. JURISDICTION

Respondent admits, and I find, that it has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION STATUS

Respondent admits, and I find, that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. FACTS

On April 22, the Union filed a petition with the Board in Case 2–RC–21302 to represent employees employed by Respondent at the facility. Pursuant to a Stipulated Election Agreement entered into by the parties and approved on May 10, an election was conducted on May 21 in the following unit:

> All full-time and regular part-time drivers, warehousemen, and office clerical employees employed by the employer at its facility at 4180 Boston Post Road, Bronx, New York, excluding all other employees and guards, professional employees and supervisors as defined in the Act.

Pursuant to a stipulation entered into by the parties and approved on October 18, involving the challenged ballots, the revised tally of ballots showed that five votes were cast for the Union, six votes were cast against the Union, and there were no remaining challenged ballots after the stipulation. The Union filed timely objections to the result of the election.

A. *The Union's Majority Status*

The parties stipulated that there were 11 employees in the above-mentioned unit during the periods relevant here. Richard Ruggiero, an organizer for the Union, testified that on April 2, he met with six of these employees at a restaurant in the Bronx. Present were Kenny Morales, a driver, Sonia Richardson, a clerical employee, Hector Herrand and Jose Brito, warehouse employees, and Oscar Turcios and Jean Claude Kerrigan, drivers. The employees asked some questions about union representation, and Ruggiero passed out union authorization cards. He told the employees that if they wanted the Union to represent them, they had to sign the cards and return them to him. He also told them that if a majority of the employees signed cards the Union would represent them, but if the Respondent refused to recognize the Union based on the cards, there was a possibility that there would be an election. At that time, Turcios, Kerrigan, Rich-

ardson, Herrand, Morales, and Brito[2] each signed union authorization cards and returned them to Ruggiero. On April 5, Richardson brought office clerical employee Dawn Giordano to meet with Ruggiero at a McDonald's restaurant. He gave her a union authorization card, which she filled out, dated April 5, and returned to Ruggiero. Ruggiero filed the petition with the Board, with the cards, on April 22.

The evidence establishes, and Respondent does not argue otherwise, that between April 2 and 9, the Union obtained authorization cards from 7 unit employees out of the unit of 11. I therefore find that beginning on April 5, the Union represented a majority of these employees.

B. *The Demand for Recognition*

Ruggiero testified that on about April 27 he called the facility, identified himself as being from the Union, and asked to speak with the owner. He believes that John Rapillo answered and identified himself. Ruggiero told him that he had authorization cards from a majority of his employees and asked if he would recognize the Union; Rapillo said that he would not recognize the Union. He said that he had turned it over to his lawyer, Seamus Tuohey, and gave him his telephone number and said that he should speak to Tuohey. He then called the number that Rapillo gave him and asked to speak to Tuohey. A man answered the phone saying that he was Tuohey, and Ruggiero identified himself, said that he had cards from a majority of Respondent's employees, and asked for recognition. ''He said no, we are going to proceed to an election. We don't believe you have all the cards, and that was the conversation.'' On the second day of hearing, about 3 months after the first hearing date, Ruggiero returned as a witness and produced a letter dated May 19[3] to Tuohey, stating:

> As per our phone conversation on April 27, 1993, it was to recognize Local 27, I.B.T. as the Bargaining Agent representing the warehousemen, drivers and officer workers of Tufo's Dairy. The employer and you have refused to acknowledge Local 27 as the LEGAL Bargaining Agent.

Ruggiero testified that he dictated this letter and personally mailed it to Tuohey on May 19. Neither his testimony on the first day of the hearing nor his affidavit given to the Board refers to this letter. He testified that after he initially testified, he looked through his files on this matter and found the May 19 letter, which he had forgotten about while testifying.

Rapillo testified that within 2 weeks of receipt of the petition he received no telephone call from either Ruggiero or anyone else from the Union. It was not until much later on that he knew of Ruggiero. The first that he learned of the union movement at the facility was when he received the petition from the Board on about April 25 or 26. Shortly thereafter, he learned of Tuohey from a neighbor, called Tuohey, and retained his firm as Respondent's counsel. Tuohey testified that his representation of Respondent began in April when he received a call from Rapillo saying that he had received a petition from the Board. His firm's time records indicate that he had a telephone call with Respondent on April 27. Tuohey wrote to the Regional Office by letter dated May 3 stating that his firm was retained by Respondent that day. He testified that prior to the election he did not receive a telephone call from Ruggiero, or any other union representative, with respect to Respondent.

This is a rather difficult, although not crucial, credibility determination. Ruggiero was an unimpressive witness whose testimony was rarely direct and brief. Most answers came with an explanation, whether requested or not. In addition, portions of his testimony were not very believable. For example, although he obtained the authorization cards by April 9, he allegedly waited until about April 27, 5 days after he filed the petition, to call Rapillo and Tuohey and then allegedly waited until May 19 to write to Tuohey to confirm the call. Rapillo, as will be discussed more fully below, was also not a very credible witness. Tuohey was a more credible witness, and I credit his testimony and find that Ruggiero never called him. That being so, I find that it is more likely that he did not call Rapillo either, and I so find. However, that does not preclude the issuance of a bargaining order. The Board finds that even in the absence of a bargaining request, a bargaining order is warranted where the unfair labor practices are so extensive that they have made the holding of a fair election unlikely, although the bargaining order will not include an 8(a)(5) violation. *Production Plating Co*., 233 NLRB 116 (1977); *Naum Bros., Inc*., 240 NLRB 311 (1979). I therefore find that if Respondent's unfair labor practices were so extensive to warrant a bargaining order under *NLRB v. Gissel Packing Co*., 395 U.S. 575 (1969), such an order would be warranted here as an 8(a)(1) bargaining order, even in the absence of a bargaining request.

C. *The 8(a)(1) Allegations and Objections*

There are numerous 8(a)(1) allegations here as well as corresponding objections. While I would normally present them chronologically, because of the nature of much of the testimony, that is difficult as the date of the alleged events are often hazy.

Richardson testified that shortly prior to the election she was promoted to office manager at the facility and one of the other employees told her that she got the promotion to prevent her from voting in the election. On the following day, she asked Steve Rapillo if that were true, and he said that it was not true, that she was given the promotion on merit. She then asked Rapillo why she was given the promotion, and he said that he gave it to her because he needed her. He then told her that he knew who started the Union; he knew someone who worked in the union office and they could tell him whose names were on the union cards. He told her that he could tie up the union campaign for years in the courts. Richardson also testified that in about the middle of April to early May, she overheard a conversation between Steve Rapillo and Serena Rapillo, Steve and John Rapillo's mother, in the office. Steve Rapillo told Serena Rapillo that if the Union came in he would close the facility rather than deal with the Union. Serena Rapillo testified that she could not recollect any specific conversation with Steve Rapillo about the Union, but that she did speak to Steve and John

[2] Brito incorrectly dated his card on April 2 and, because Ruggiero had no additional authorization cards with him at that time, he gave Brito another card a week later, which was signed and dated April 9.

[3] Ruggiero had no explanation for the 3-week delay between his alleged conversation with Tuohey and this letter.

Rapillo about the Union at the facility during that period, but not in the presence of other employees.

Kerrigan testified that about 2 weeks prior to the election, while he was in the office at the facility, Rapillo asked him if he was going to vote and who he was going to vote for. Kerrigan answered that he did not know, and Rapillo asked him to vote for him. Rapillo testified that he never asked any employee how they intended to vote in the election.

Herrand testified that in March (this is probably incorrect) while he was in the warehouse at the facility, Rapillo asked him if he had heard anything about the Union and he answered no. Rapillo asked him if he was sure and he said that he was.

Turcios testified that Rapillo spoke to him about the Union every other day during that period; in April, while he was outside the office at the facility, Rapillo asked him if he was approached by someone from the Union to sign a union authorization card, and he answered no. Rapillo then said that he had received a letter saying that employees had signed union cards, and he thought that it was the drivers. Turcios asked him how he knew this, and Rapillo said that he had friends in the Teamsters. Rapillo testified that he never told any employee that he had received a letter or telephone call from the Union or that he knew how they had voted because he had friends at the Teamsters or at the Department of Labor. In addition, he testified that he never asked Turcios if he knew which employees were in the Union, although he did ask him if he were aware that the Union was organizing the employees at the facility. Turcios testified further that on a Friday during this period, after he returned to the facility after completing his route, Rapillo approached him and told him that if the Union got in it would destroy his business, his mother and brother would be out in the street, ''and we'll be without a job.''

There was testimony about an alleged threat by Rapillo that if the Union won the election the employees could not continue to work for him because they would need a commercial driver's license (CDL). Turcios testified that (presumably) during the preelection period Rapillo told him that ''if the Union gets in, they'll try to get rid of the drivers because we don't have commercial driving licenses.'' At that time, he did not have a CDL; at the time of the hearing here, he did. At about that time, Steve Rapillo was making arrangements for the drivers to be trained and tested for their CDLs. Rapillo testified that sometime in 1992, the State changed a law and required drivers of vehicles over 18,000 pounds to have a CDL; the change was to be effective January 1, 1993. Because the State could not handle the large number of applicants by that time, they extended the date by 5 or 6 months. During this period, he was making arrangements for his drivers to obtain their licenses. He ''pointed out'' to his drivers ''that I did not believe that the Union was going to allow them to drive for me unless they had their license because it was actually breaking the law.''

Turcios testified that about a week after the election, while he was with Herrand, Kerrigan, and another employee outside the office at the facility, he said to Rapillo that the drivers were still working a 45-hour week, even though Rapillo had said at the May 19 meeting that it would change, and Rapillo said that he could not make any changes because the Union was suing him. Turcios said that didn't have anything to do with it, and Rapillo said that if he would get the Union off his back they will have it. Kerrigan testified that sometime after the election, he, Turcios, and Herrand approached Rapillo in the office at the facility and they asked him if they could work a 40-hour week rather than the 45-hour week that they were working. Rapillo said that now that the Union was ''involved,'' he could not do it. On cross-examination, he testified that Rapillo said that he couldn't make the change because of the union election and the ''legal matter was pending.'' Rapillo testified that during the week following the election, employees approached him and asked him what was happening with the 40-hour workweek, and he told them that he ''was still involved with the Union,'' and could not do anything at that time.

It is alleged that Respondent, by Rapillo, in about May, impliedly promised to pay an employee's delinquent parking tickets if the Union lost the election. The employee involved is Herrand. The sole testimony on direct examination on this allegation is as follows:

> Q. Do you remember what John Rapillo said to you?
>
> A. Yeah. He told me if I—if I have some problem with my driver's license and—
>
> JUDGE BIBLOWITZ: Problem with your driver's license and?
>
> THE WITNESS: Yes—I owe tickets.
>
> JUDGE BIBLOWITZ: You owe some tickets.
>
> THE WITNESS: Yes.
>
> JUDGE BIBLOWITZ: Okay. What did John say to you, if anything?
>
> THE WITNESS: I told him yes. So he said, ''We'll talk after the election.''

On cross-examination, Herrand was asked:

> Q. Now, isn't it the case that when you spoke with John Rapillo about the unpaid tickets, you approached him and raised the subject?
>
> A. No.

On a related subject, Herrand testified that, on request, in the past he and other employees were sometimes given advances on their salary by Rapillo, and that he sometimes asked Rapillo for advances. The cross-examination continued:

> Q. And your testimony is that he came up to you and said that he knew you had unpaid tickets, and—and then the rest of the conversation followed?
>
> A. Yes.
>
> Q. Did he indicate to you how he knew that you had the unpaid tickets?
>
> A. No
>
> Q. Did you ask him how he knew you had the unpaid tickets?
>
> A. No.
>
> Q. When you got advances, that was as a result of your going to him and asking for that?
>
> A. Yeah.
>
> Q. Okay, and isn't it the case, sir, that you went to him about the tickets in the same way?
>
> A. No.
>
> Q. Isn't it the case, sir, that you went to Mr. Rapillo and asked him for an advance so you could pay the tickets?
>
> A. No.

Herrand testified that the tickets, which amounted to over $1 thousand, were not related to his job, and that he paid them out of his own money. Rapillo testified that prior to the Union coming to the facility, he had a policy of loaning money to employees or advancing them money on their wages. Whether he would do so depended on the employees involved, and the amount requested. Rapillo testified that Herrand approached him and told him that his license was taken away because he had over $1 thousand of parking tickets, and he asked if he could borrow the money to pay for the tickets. Rapillo told him that it was too much money, but he did loan him $500, which Herrand repaid about $50 a week for 10 weeks. He never promised to pay these tickets if the Union lost the election.

Respondent held a meeting of most of its employees in the office at the facility on May 19, 2 days prior to the election. It is alleged that Respondent scheduled this as a mandatory meeting in order to interfere with a previously scheduled union meeting, and at the meeting promised employees a 40-hour week and other specified benefits if they voted against the Union in the upcoming election, and threatened to discharge all the drivers if the Union was selected as their bargaining representative. It is alleged that this conduct violates Section 8(a)(1) of the Act and is objectionable conduct as well.

Richardson testified that she was never told by Rapillo that there was to be a meeting with the employees on May 19, and on that evening, after work, she went home and then took a taxi to Herrand's house for the union meeting that had previously been scheduled for that evening. She was the only employee present, along with Ruggiero and Herrand's wife. She could not recollect what time she arrived at this meeting, although her affidavit states that she arrived there at about 8 or 8:30 p.m. Kerrigan testified that on May 19, after he had finished work at about 5 or 5:30 p.m., he went to a gym to work out. While he was outside the gym, Rapillo drove up and told him that he was going to have a meeting of employees later that day and he wanted him to attend. Kerrigan testified that the meeting began at about 7 or 7:30 p.m., and he returned to the facility at about 7 p.m., and the employees were waiting for the meeting to begin. At the meeting, Rapillo said that he knew of the union meeting at Herrand's house that evening. He also said that if the Union gets involved ''there won't be anymore favors,'' because if the employees needed something, they would have to go to the Union instead of going to him. If the Union were involved, ''we won't be able to speak to each other'' and, if the Union were involved, he could fire anybody he wanted, and could fire any driver who did not have a CDL. He stayed at the meeting for between 1 and 1-1/2 hours and left before the meeting had concluded because he had other things to do.

Turcios testified that when he returned to the facility from his route on May 19, Rapillo told him that there was going to be a meeting of employees that evening; Turcios told him that he could not remain as he had something to do, but Rapillo told him that he had to stay. About 15 minutes later, the meeting began. Rapillo began by telling the employees that the Respondent didn't need the Union because they could not guarantee them anything; only Respondent could guarantee them something. He then said that the Union was involved because something was wrong. Turcios said that they were working 45 hours before they received overtime pay when they should get overtime pay after 40 hours, and Rapillo said that was something that was there while his father operated the business and he thought that it was okay with the employees. Turcios said that he had complained about it on three prior occasions. He testified that Rapillo responded that if the Union lost the election, they would be paid overtime after 40 hours. Rapillo then asked the employees how they were going to vote, and all the employees said that they were going to vote against the Union. Herrand testified that at this meeting, Rapillo ''promised us a 40 hour work week if we voted no on the election,'' and said that if the Union won the election, ''we shouldn't ask any personal favors or getting paid in advance.''

Henry Jallum, who has been employed by Respondent for over 2 years (off the books), testified that the meeting began at about 5:45 p.m. Rapillo told the employees that he had a new company and didn't want to get involved with the Union. He said that the Union would take dues out of their wages, and that if the employees had any problems, they should come to him first. One of the employees said that they wanted to work a 40-hour week rather than a 45-hour week, and Rapillo said that he would look into it, but would not promise anything, ''not now.'' He never said that any employee would lose his job if the Union were elected. Ann Marie Szola, who has been employed by Respondent since January, testified that she was told of the meeting earlier that afternoon and that she attended the meeting. All the employees except for Richardson and Dawn Giordano, another office employee, attended, and Kerrigan arrived when the meeting was finished. An employee asked about getting a 40-hour workweek, and Rapillo said that he would listen to anybody, but could make no promises. He never threatened to fire anyone, nor did he ever threaten to close the facility if the Union won the election.

Rapillo testified that he decided to hold the meeting a few days earlier, but told each of his employees about the meeting on the day of the meeting, May 19. He told them that he ''would like everybody to attend if they could.'' All the employees except for Richardson and Giordano attended; Kerrigan arrived at the end of the meeting. He had not seen Kerrigan, a driver, all that day and somebody told him that he was at the gym. Rapillo went there and told him about the meeting and that he would like it if he attended it if he could, and Kerrigan said that he had something to do, but that he would try to get there. Richardson and Giordano were asked to come and were not disciplined for missing the meeting. He testified that earlier that week, Jallum had told him that the Union was having a meeting that week, but he did not know that the Union had a meeting scheduled that evening. The employees who remained at the facility to attend the meeting were paid for the time. The meeting began between 6 and 6:15 p.m. and lasted for a little over an hour. He began the meeting by telling the employees that while the Union could make them promises, he could not do so. He said that the Union would collect dues from them and would negotiate with him on their behalf. It was a small company and he did not believe that they needed a union to speak for them. He said that the election was on Friday, that it was a secret ballot, and encouraged everyone to vote. At this meeting he never threatened to close the facility, fire anyone because of their support for the Union, or that he would change or withdraw benefits if the employees supported the

Union. During the meeting, Turcios said that he was not happy about working a 45-hour week. Rapillo said that it was the first that he had heard of it, that his father had it while he operated the Company, and when he and his brother took over the Respondent in 1988 they kept it that way being unaware of any problem. ''I made the point that I certainly could not promise anything with regard to the 45-hour workweek. After the election was over, we could bring up the matter again in the future and discuss it further.''

The final allegation is that in about late September and October, Respondent, by Rapillo, interfered with the Board's processes by discouraging employees from obeying the Board's subpoenas. This allegation involves Turcios, whose attendance the Board had difficulty obtaining. The hearing here opened on August 24, 1994; Kerrigan, Herrand, and Turcios, who had been subpoenaed to appear by counsel for the General Counsel, did not appear at that time. Kerrigan appeared at the second day of hearing, November 3, 1994. By order of Honorable Robert J. Ward, United States District Judge for the Southern District of New York, dated September 20, 1994, Turcios and Herrand were ordered to appear before me for the second day of hearing on November 3, 1994. They did not so appear. Judge Ward issued further orders dated January 10, 1995, wherein he found Turcios and Herrand in civil contempt of his prior orders, and he further ordered that if they did not purge themselves of this contempt (by appearing as demanded) they would be fined and imprisoned. They appeared at the third day of hearing, March 28, 1995.

Turcios did not work from about the beginning of August through the end of September 1994 due to a work-related injury that he incurred while employed by Respondent. He testified that, during this period, he did not receive any wages or Workmen's Compensation payments and at the end of September he called Rapillo and told him that he had not received Workmen's Comp because they said that they had not received the report from Respondent. Rapillo said that he had sent in the report and would call Workmen's Comp. Rapillo asked him if he would be returning to the facility because he heard that he was looking for another job. Turcios said that he liked his job and wanted to return to it. Rapillo then told him that the union hearing was coming up soon and that ''he would appreciate it if I wouldn't show up.'' Turcios said, ''okay.'' In the beginning of October 1994, after Turcios had returned to work, he spoke to Rapillo in the office. He told Rapillo that he received the subpoena and Rapillo told him: ''Don't worry about it, because they never enforce that.'' Turcios asked, ''Do you think so?'' Rapillo answered: ''Well, I can't tell you what to do, but I would appreciate it if you would skip it.'' He told Turcios that the Government would not do anything: ''It's not like you're a witness to a crime.''

Rapillo's testimony on this subject is far from clear.[4] He testified that prior to the first day of hearing, Turcios told him that he was subpoenaed to appear at the hearing, but did not want to get involved, and asked Rapillo what he should do. Rapillo told him that, ''it's obvious that it's in my best interest that he didn't go, but that he has to decide for himself if he wanted to go.'' He testified further that, at about the time of the second day of hearing, Turcios approached him and said that he was told to appear, that he didn't want to get involved, and asked what would happen if he did not appear. Rapillo answered: ''I said my understanding from talking to counsel was that they normally don't enforce those subpoenas but, again, he had to decide for himself. I couldn't decide for him.'' Rapillo was initially cross-examined prior to counsel for the General Counsel notifying the parties that Turcios had tape recorded certain conversations with Rapillo about a week before the March 28, 1995 hearing in which Turcios testified. The contents of these conversations is not alleged as a violation here, and therefore this tape recording[5] was received into evidence solely on the issue of credibility. However, because of the seriousness of the allegation that Respondent interfered with the Board's processes, as well as Judge Ward's orders, I note that in these conversations Rapillo told Turcios that he did not have to appear because the Government never enforces the subpoenas, and he repeated that point a number of times. He also told him on a few occasions in these conversations that he could not stop him from going, but it was in his best interest if Turcios did not go. The implication from the latter statement is obvious, while in the prior statement, Rapillo was recommending that Turcios defy Judge Ward's order and the Board's subpoena.

D. *Analysis of 8(a)(1) Allegations and Objections*

I generally found the employee witnesses more credible than Rapillo. Although portions of his testimony were reasonable and understandable, at other times he was evasive and, especially on the Turcios subpoena issue, clearly not credible. On the other hand, I found Richardson, who is no longer employed by Respondent, to be a bright and credible witness. Turcios and Herrand were also direct and credible witnesses, even if their testimony sometimes lacked specificity and details.

The first allegation to be discussed here is that the Respondent scheduled the May 19 meeting to conflict with the union meeting and at the meeting promised employees a 40-hour week and other unspecified benefits if they voted against the Union in the upcoming election, and threatened to discharge all of the employees if the Union was selected as their bargaining representative. Initially, I do not credit Kerrigan's testimony that at this meeting Rapillo said that he knew of the union meeting scheduled at Herrand's house that evening. I credit Szola's testimony that Kerrigan arrived at the conclusion of the meeting, and I find it highly unlikely that Rapillo would make such an admission to his employees 2 days prior to the election. However, based upon all the evi-

[4] I should note that at the conclusion of the second day of hearing on November 3, 1994, when the parties were discussing resumption dates caused by the failure of Turcios and Herrand to appear, counsel for Respondent stated: ''His instruction from us was not to talk to Oscar about this case. And so whether Oscar was subpoenaed or not, isn't his business. If Oscar approached him, we told him that he's not to give any advice about it because we don't want any further allegations.''

[5] Counsel for the General Counsel and counsel for Respondent each submitted their proposed transcript of the contents of this tape (G.C. Exh. 14). Although there are understandable differences in these proposed transcripts (portions of the tape are indecipherable), these differences are not material to the issues here. Either way, they show that Rapillo was evasive and was not being open and honest about this conversation and, presumably, about the two earlier conversations on the subject, as well.

dence on the subject, I find that Rapillo purposely scheduled this meeting to prevent the employees from attending the union meeting that evening at Herrand's house. The election date of May 21 was agreed to by the parties on May 10 and yet Rapillo waited until the afternoon of May 19 to notify his employees of the meeting to be held later that day. I do not credit his testimony that he decided to hold the meeting on that day a few days earlier; if that were true, why didn't he tell the employees of the date earlier than the afternoon of May 19? Supporting my finding that this was a last minute decision is the fact that Rapillo has to chase after Kerrigan at his health club to tell him about the meeting. There was also no testimony from Rapillo about why he chose May 19, rather than any other day. I find that a reasonable conclusion is that Rapillo learned earlier that day (possibly from Jallum) that the Union was having a meeting that day, and decided to have a meeting of his employees in order to prevent them from attending the union meeting. I therefore find that this constitutes objectionable conduct by Respondent and violates Section 8(a)(1) of the Act. *Alert Medical Transport*, 276 NLRB 631, 665 (1985).

It is next alleged that statements by Rapillo at this meeting violated the Act. As Richardson did not attend the meeting, and as I have credited the testimony of Szola that Kerrigan arrived when the meeting had been completed, the only testimony to support these allegations is from Turcios and Herrand, whom I have found to be credible witnesses. On the basis of their credited testimony, I find that after Turcios brought up the 45-hour workweek issue at the meeting, Rapillo told the employees that if the Union lost the election, he would pay them overtime after 40 hours of work. Such a promise of benefit clearly is objectionable conduct and violates Section 8(a)(1) of the Act as well. I find no credible evidence to support the allegation that at this meeting Rapillo threatened to discharge his drivers if the Union was selected as their bargaining representative, and would therefore recommend that this allegation be dismissed and the corresponding objection be overruled.

Richardson testified credibly that shortly prior to the election, during a conversation that she initiated with Rapillo to learn why she was selected for a promotion, he told her that he knew who started the union movement at the facility because he knew somebody at the union office who could tell him the names on the union cards. In *United Charter Service*, 306 NLRB 150 (1992), the Board stated that it applies the following test in impression of surveillance cases: ''Whether employees would reasonably assume from the statement in question that their union activities have been placed under surveillance.'' The Board stated further that in these cases it does not require the employees to keep their activities secret, and does not require that the employer's words reveal that it acquired its knowledge of the employees' activities by unlawful means. Rapillo's words to Richardson satisfies this test, and I therefore find that it violates Section 8(a)(1) of the Act and, correspondingly, I sustain the objection based on this allegation. In this conversation, Rapillo also told Richardson that he could tie up the union campaign for 2 years in the courts. This violates Section 8(a)(1) of the Act as a warning that it would be futile for the employees to attempt to select the Union as their bargaining representative. *Atlas Microfilming*, 267 NLRB 682, 685–686 (1983); *Sivalis, Inc*., 307 NLRB 986, 1001 (1992). I find that this constitutes objectionable conduct as well.

I credit Richardson's testimony that in about mid-April to early May, she overheard a conversation between Steve and Serena Rapillo where Steve Rapillo told Serena Rapillo that if the Union came in he would close the facility rather than deal with the Union. In *Nemacolin Country Club*, 291 NLRB 456, 460 (1988), an employee overheard a conversation between an agent of Respondent and a member of Respondent, wherein the agent said that they could fire all the employees in order to keep the union out. The administrative law judge stated: ''It is well settled that the assessment of a statement, for purposes of Section 8(a)(1) does not turn on the employer's motive, but the test of legality is whether the remark tended to impede employees in the exercise of their Section 7 rights.'' Steve Rapillo's statement would clearly have that effect, and I therefore find that it violates Section 8(a)(1) of the Act. I also sustain the objection based on this conduct.

Kerrigan testified that about 2 weeks before the election, while he was in the office, Rapillo asked him if he was going to vote and who he was going to vote for. Although I have previously discredited Kerrigan regarding the time that he arrived at the May 19 meeting, I found him, overall, to be more credible than Rapillo, and would credit his testimony regarding this incident. As there were no open and active union supporters here, and as this questioning was by the boss and had no legitimate purpose, I find that it violates Section 8(a)(1) of the Act. *Rossmore House*, 269 NLRB 1176 (1984). I would also sustain the objection based on this conduct. I also credit Herrand's testimony that Rapillo asked him if he had heard anything about the Union. When he answered that he had not, Rapillo asked him if he was sure, and he said that he was. As discussed above, this questioning by the boss, without a legitimate purpose, of an employee who was not an active and open union supporter, violates Section 8(a)(1) of the Act, and I sustain the objection based on this activity. I also credit Turcios' testimony that in April, Rapillo asked him if he was approached by anyone asking him to sign a union card. He had no legitimate reason to ask Turcios this question other than to attempt to intimidate him regarding his support for the Union. It violates Section 8(a)(1) of the Act, and I sustain the objection based on this conduct.

Turcios also testified that during this period, when he returned to the facility from his route, Rapillo approached him and said that if the Union got in it would destroy his business, his mother and brother would be out in the street, and the employees would be out of a job. It requires no case citations to find that a statement by the boss to an employee that the business would close and they would all be out of jobs simply because the Union won the election violates Section 8(a)(1) of the Act.

Turcios testified that during this period, Rapillo told him that if the Union got in they would try to get rid of the drivers because they did not have CDLs. Rapillo's testimony is that he told the drivers that he did not believe the Union was going to allow them to continue driving for the Respondent because they did not have CDLs. The difference is minor, but, again, I would credit Turcios. In *NLRB v. Gissel Packing Co*, 395 U.S. 575 (1969), the Court stated:

> Thus, an employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a ''threat of reprisal or force or promise of benefit.'' He may even make a prediction as to the precise effect he believes unionization will have on his company. In such a case, however, the prediction must be carefully phrased on the basis of objective fact to convey an employer's belief as to demonstrably probable consequences beyond his control . . . .

Under this test, Rapillo's statement clearly violates the Act. There is absolutely no evidence that the Union was going to prevent Respondent's drivers lacking CDLs from driving if it won the election. Rather, this was a bare threat by Rapillo in attempting to convince the employees to vote no in the upcoming election. The only difference is that in this threat, as compared to the others here, he placed the onus on the Union.

It is next alleged that in about June, Respondent promised employees a 40-hour workweek if they put an end to the Union's attempt to be their bargaining representative. The credited testimony of Turcios establishes that shortly after the election, he, Herrand, and Kerrigan approached Rapillo and told him that although he had promised them at the May 19 meeting that they would get a 40-hour workweek, they were still working a 45-hour week. Rapillo said that he couldn't make any changes because the Union was ''suing him,'' although I find it more likely that he said that he couldn't make the changes because of the pending Board charges and objections. Turcios said that they didn't have anything to do with it, and Rapillo told them that if they got the Union off his back, they would have it. It is in these types of cases that employers allege that they have a ''Hobson's Choice''; do they grant the benefits and risk a finding of objectionable conduct based on unlawfully granting benefits, or do they refuse to grant the benefit and risk a finding of objectionable conduct for unlawfully *withholding* a benefit? In *Village Thrift Store*, 272 NLRB 572 (1984), the Board stated:

> The Board has resolved this dilemma by permitting employers to tell their employees that those benefits previously provided in an indefinite manner will be deferred during the pendency of organizational efforts where they make clear that the purpose in doing so is to avoid the appearance of interference.

That situation is not present here. The benefit here is not one that had been regularly provided to the employees prior to the union campaign. Rather, it was one that Rapillo first promised to them only 2 days prior to the election. This was not a Hobson's Choice; this was a dilemma that Rapillo created himself by unlawfully promising them a benefit if they did not support the Union. I therefore find that by telling the employees that he could not give them a 40-hour workweek because of the pending union objections, Respondent violated Section 8(a)(1) of the Act.

It is next alleged that in about May, Respondent violated Section 8(a)(1) of the Act by impliedly promising to pay Herrand's parking tickets if the Union lost the election. Whereas I have generally discredited Rapillo's testimony, I find Herrand's testimony on this allegation so confused, unlikely, and incredible that I credit Rapillo's testimony and recommend that this allegation be dismissed. Herrand testified that Rapillo initiated the conversation about his unpaid tickets. These were tickets that Herrand incurred personally and I can find no explanation of how Rapillo would have learned of the tickets unless Herrand first told him about them. I therefore recommend that this allegation be dismissed.

The final allegation is the one that was filed pursuant to a notice of motion to amend complaint, dated January 18, 1995, that in about September and October 1994, Respondent, by Rapillo, interfered with the Board's processes by discouraging employees from obeying the Board's processes. The credited testimony of Turcios establishes that in September, when he called Rapillo to complain about the fact that he had not received any Workmen's Comp, Rapillo said that the hearing was coming up soon and that ''he would appreciate it'' if Turcios did not show up (Rapillo learned at the first day of hearing on August 24, 1994, that Turcios had been subpoenaed, but had not appeared). In October 1994, after Turcios told Rapillo that he had received the subpoena (actually, he was probably referring to Judge Ward's order dated September 20, 1994), Rapillo told him that the Board never enforces subpoenas and that the Board wouldn't do anything to him if he failed to appear because: ''It's not like you're a witness to a crime.'' He also told Turcios, ''Well, I can't tell you what to do, but I would appreciate it if you would skip it.''

In *Mr. F'S Beef & Bourbon*, 212 NLRB 462 at 466 (1974), Administrative Law Judge Walter H. Maloney Jr. succinctly stated the applicable law here:

> As Congress has never invested the Board or its examiners with contempt powers, a notion occasionally arises in the minds of some that subpoenas issued by this Agency to compel the attendance of witnesses at formal hearings do not impose upon the recipient an obligation to comply, unless and until the subpoena is enforced by an Order issued by a United States district judge. The Board long ago laid this notion to rest in *Winn-Dixie Stores, Inc*., 128 NLRB 574, when it issued an admonition not to confuse the legal obligation to honor a Board subpoena with the procedure spelled out by Congress for enforcing that obligation. Hence, when an employer informs an employee that he does not have to comply with a Board subpoena, or when it tells him that he is free to suit himself in deciding whether to go or not to go to a Board hearing in response to the commands of a subpoena, such statements constitute unlawful interference with Section 7 rights and are a violation of Section 8(a)(1) of the Act.

Judge Maloney's words certainly fit the facts here. Rapillo told Turcios that he would appreciate it if he did not show up for the hearing, and that the Board never enforces subpoenas and would not do anything to him if he failed to appear in court. I find Rapillo's actions here extremely serious. Not only was he advising Turcios to refuse to comply with the Board's subpoena, but he was also recommending that he disobey the orders of Judge Ward and the Regional Office might consider referring this matter to the United States at-

torney for the Southern District of New York. Regardless, Rapillo's statements to Turcios clearly were intended to convince him to disobey the Board's subpoena, and violates Section 8(a)(1) of the Act. *Bobs Motors*, 241 NLRB 1236 (1979); *Nestle Co*., 248 NLRB 732, 740 (1980).

E. *The Objections*

On the basis of the above findings, I conclude that Respondent has engaged in conduct warranting the setting aside of the election conducted on May 21, 1993.

F. *Gissel Bargaining Order*

There were 11 employees in the unit during the period in question. I have found that Respondent has committed the following 8(a)(1) violations: affecting all the employees, Respondent purposely scheduled the May 19 meeting to prevent the employees from attending a union meeting that evening and, at the May 19 meeting, promised the drivers a 40-hour workweek if the Union lost the election. Respondent's 8(a)(1) violation of telling the employees that he could not give the drivers a 40-hour workweek because of the Union's objections was made to Turcios, Kerrigan, and Herrand. The remaining violations were each made to individual employees: impression of surveillance and the futility of union representation (Richardson), threat to close (Richardson), interrogations (Kerrigan, Herrand, and Turcios), threat to close (Turcios), threat that the Union will have the drivers who lacked CDLs fired (Turcios), and interference with Board's processes (Turcios). I find that this conduct, while very serious, does not quite reach the level of '''exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices.'' *Gissel*, supra at 613. However, the Court stated there that the Board had the authority to issue bargaining orders on a lesser showing of employer misconduct where, at one point, the union had a majority. The Court concluded:

> In fashioning a remedy in the exercise of its discretion, then, the Board can properly take into consideration the extensiveness of an employer's unfair practices in terms of their past effect on election conditions and the likelihood of their recurrence in the future. If the Board finds that the possibility of erasing the effects of past practices and of ensuring a fair election (or a fair rerun) by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order, then such an order should issue.

I find that the extensiveness of the unfair labor practices here makes the holding of a fair second election highly unlikely. Additionally, I find it likely that if there were a second election, Respondent would repeat the activities that are set forth above. One reason for this finding is that Rapillo attempted to convince Turcios not to comply with the Board's subpoena and Judge Ward's order, even though his counsel had warned him against doing so. That convinces me that he is incapable of allowing his employees to decide the issue of union representation without his interference. I therefore find that a *Gissel* bargaining order is warranted, and I therefore recommend that the petition in Case 2–RC–21302 be dismissed.

CONCLUSIONS OF LAW

1. Respondent has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Scheduled a meeting of its employees at a time which would prevent them from attending a previously scheduled union meeting.

(b) Promised its drivers overtime pay after 40 hours of work if the Union lost the election.

(c) Created an impression among its employees that their union activities were under surveillance.

(d) Threatened to close the facility rather than deal with the Union.

(e) Interrogated its employees regarding their union activities.

(f) Threatened its employees that if the Union won the election they would be out of a job.

(g) Threatened its employees that if the Union won the election the Union would prevent the drivers from working unless they possessed commercial drivers' licenses.

(h) Blamed the Union for the fact that it could not give the drivers a 40-hour workweek.

(i) Interfered with the Board's processes by telling an employee that he did not have to honor a Board subpoena.

(j) Informed the employees that it would be futile for them to select the Union as their bargaining representative.

4. The Respondent did not violate the Act as further alleged in the consolidated complaint.

5. The following unit is appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and regular part time warehousemen, drivers and office clerical workers, but excluding all other employees, supervisors, professional employees and guards as defined in the Act.

6. Since on about April 5, 1993, and at all times thereafter, the Union has represented a majority of the employees in the above-described unit, and has been the exclusive representative of these employees for purposes of collective bargaining within the meaning of Section 9(a) of the Act.

7. The Respondent's unlawful conduct interfered with the representation election conducted on May 21, 1993.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it be ordered to cease and desist therefore and that it take certain affirmative action designed to effectuate the policies of the Act. As set forth above, I shall recommend that Respondent be ordered to recognize and, on request, to bargain with the Union as the exclusive bargaining representative of its employees in the above-described unit. As a bargaining order has been found to be appropriate, I recommend that the election conducted in Case 2–RC–21302 be set aside and that the petition in that matter be dismissed.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Tufo Wholesale Dairy, Inc., Bronx, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Scheduling meetings with its employees in order to prevent them from attending previously scheduled union meetings.

(b) Promising its employees improved benefits if the Union lost the upcoming election.

(c) Creating an impression among its employees that their union activities were under surveillance by Respondent.

(d) Threatening to close the facility rather than deal with the Union.

(e) Interrogating its employees about their union activities.

(f) Threatening its employees that they would be out of a job if the Union won the election.

(g) Threatening its employees that, if the Union won the election, the Union would try to prevent all drivers without commercial drivers' licenses from working for Respondent.

(h) Telling its employees that because of the Union and its objections to the election, it could not grant them a 40-hour workweek.

(i) Interfering with the Board's processes by telling employees that they did not have to appear pursuant to Board subpoenas.

(j) Informing its employees that it would be futile for them to attempt to select the Union as their bargaining representative.

(k) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action designed to effectuate the policies of the Act.

(a) Recognize and, on request, bargain with the Union as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part time warehousemen, drivers and office clerical workers, but excluding all other employees, supervisors, professional employees and guards as defined in the Act.

(b) Post at its facility in the Bronx, New York, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and shall be maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps Respondent has taken to comply.

IT IS FURTHER ORDERED that the consolidated complaint be dismissed as to allegations not specifically found here.

IT IS FURTHER ORDERED that the petition in Case 2–RC–21302 be dismissed.

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[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''